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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

WILLIAM CHARLES JANSEN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

OPINIONS BELOW

No opinions were delivered or reported by any of the Courts below.

JURISDICTION

The judgment of the Circuit Court of Fauquier County, Virginia was rendered on the 3rd day of December, 1974 (App. A). A Petition for a Writ of

Error was rejected and refused by the Supreme Court of Virginia on the 27th day of August, 1975 (App. B). A Petition for Rehearing was denied by the Supreme Court of Virginia on the 5th day of September, 1975 (App. C). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Is an affidavit which omits altogether to state the time of the occurrence of the facts relied upon sufficient to show probable cause for the issuance of a search warrant?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On December 3, 1974 William Charles Jansen was convicted after a jury trial of knowingly possessing with intent to distribute tetrohydrocannabinols in violation of the Code of Virginia. The Petitioner received a sentence of fifteen years in the penitentiary and a fine of Twenty-Five Thousand Dollars ($25,000.00).

On the 26th day of February, 1974 R.O. Jacobson, an investigator with the Virginia State Police, filed an affidavit for a search warrant with a Deputy Clerk of the Fauquier County General District Court. Based on said affidavit, the Deputy Clerk issued a search warrant. Under the authority of the search warrant, a search of a two story log dwelling in Fauquier County, Virginia was made. The officers seized over one hundred (100) pounds of marijuana containing tetrohydrocannabinols and two scales. The affidavit in question is reproduced in full as Appendix D. The Petitioner filed a motion to suppress the evidence obtained pursuant to the search warrant specifically stating his grounds that the affidavit did not state the time of the occurrence of the facts relied upon and, therefore, was without probable cause for the issuance of a search warrant. After argument on August 14, 1974, the trial court took the matter under advisement and, as requested, counsel submitted authorities in support of their positions.

On October 4, 1974, just prior to the jury trial of this case, the trial court orally denied the defendant's motion to suppress evidence obtained from the search of the log cabin (Tr. Oct. 4, P. 2-3).

During the trial of this case, three Arlington County Narcotics Detectives and one Virginia State Trooper testified in detail to the search and seizure of the

marijuana and scales located at the cabin. In addition, a state fingerprint expert and a state chemist exhibited and displayed to the jury the marijuana and scales seized at the log cabin.

After the Commonwealth had presented all of its evidence, the trial court excluded all of the evidence obtained at the search of the log cabin, apparently on the ground that the Commonwealth did not prove that this evidence was the same evidence in the possession of the defendant (Tr. Oct. 7, P. 301, 302). The court instructed the jury not to consider as evidence the marijuana and scales seized at the log cabin (Tr. Oct. 7, P. 321, 322).

After the jury verdict, on November 5, 1974, the trial court again denied the defendant's motion to set aside the jury verdict based on the illegal search warrant used to search the log cabin. The Petitioner, having no right of appeal in the Commonwealth of Virginia, petitioned the Supreme Court of Virginia for a Writ of Error citing as error the trial court's failure to suppress the evidence obtained in the search of the log cabin. Said Petition was denied and rejected by the Supreme Court of Virginia.

ARGUMENT

In this case a State court in the Commonwealth of Virginia has ruled that it is not necessary in an affidavit in support of the issuance of a search warrant to state the time of the occurrence of the facts relied upon to show probable cause for the issuance of a search warrant. This ruling is not in accord with the decisions

of the Supreme Court of the United States. This ruling is not in accord with the decisions of the vast majority of the State courts in this country. See Annot., *Search Warrant: Sufficiency of Showing as to Time of Occurrence of Facts Relied On.* 100 A.L.R. 2d 525 (1965). Since 1932, in the case of *Sgro v. United States,* 287 U.S. 206, the rule has been that the proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.

In *Aguilar v. State of Texas,* 378 U.S. 108 at page 110 the Court stated:

> "In *Ker v. California,* 378 U.S. 23, 83 S.Ct. 1623, 10 L. Ed. 2d 726, we held that the Fourth 'Amendments proscriptions are enforced against the State through the Fourteenth Amendment,' and that 'the standard of reasonableness is the same under the Fourth and Fourteenth Amendments.' Id., 374 U.S. at 33, 83 S.Ct. at 1630. Although *Ker* involved a search without a warrant, that case must certainly be read as holding that the standard for obtaining a search warrant is likewise 'the same under the Fourth and Fourteenth Amendments.' "

The Supreme Court of Virginia has held that the Virginia Statute controlling the issuance of search warrants are in substance the same as those contained in the Fourth Amendment. *Kirby v. Commonwealth,* 209 Va. 806, 167 S.E.2d 411 (1969) The Virginia Supreme Court has also stated that although the Virginia Statutes fixed no maximum time interval between the date of the events and circumstances recited in the affidavit and the date of the affidavit and

issuance of the warrant, the proof required must be proof of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. *Huff v. Commonwealth*, 213 Va. 710, 194 S.E.2d 690 (1973)

The Commonwealth of Virginia, and your Petitioner believes many other states for various economic and political reasons, authorize many persons without legal training or required training of any sort to issue search warrants. As in this case, the Deputy Clerk of the General District Court of Fauquier County had no legal education and she did not review any of the cases involving searches and seizures, and basically had no standards except her own personal opinion to determine whether or not to issue a search warrant. (Tr. May 9, P. 25-35)

The issuing officer or magistrate or whomever is authorized to issue search warrants is the primary protector of the citizen against unconstitutional envasions of their right of privacy. His job is made even more difficult because the proceeding to obtain a search warrant is invariably an ex-parte proceeding. The magistrate is required to be neutral and detached in making his decision as to whether or not probable cause exists for the issuance of a search warrant. This is a discretionary decision and can only be made when sufficient facts are presented to the issuing officer. The recent rulings of this Court allow the police to present hearsay declarations, see *United States v. Ventresca*, 380 U.S. 102, and also to utilize information from unnamed informants, *Spinelli v. United States*, 393 U.S. 410 in acquiring search warrants. These decisions make it more difficult for the issuing officer to make a

determination as to the validity of the facts presented and more difficult to protect the citizens from the actions of police officers who, because of their partisanship, sometimes have difficulty being impartial in their cause.

One of the problems confronting the issuing officer is what facts amount to a clear and definite statement as to the time of the occurrence of the events relied upon to show probable cause for the issuance of the search warrant. The recent decisions in this regard by many courts have given the police the opportunity to cleverly draw affidavit without giving a definite statement as to the date of the occurrence of the events relied upon. These affidavits are, in effect, circumventing the requirements of the Fourth Amendment of the Constitution of the United States. As the Court said in *Durham v. United States,* 403 F.2d 190, note 6 (9th Cir. 1968):

> "The length of time lapse alone is not controlling since even a brief delay may preclude an inference of probable cause in some circumstances while in others a relatively long delay may not do so."

However, a definite statement of the time when the events occur is needed in an affidavit so that the magistrate can make a determination on facts, not on loose, vague or doubtful statements of time in the affidavit.

Some of the more common substitutes for a definite time and date as used in affidavits are "recently," "within the last few days," "within the last thirty days," "on many occasions," "subsequent dates," and even a statement that an offense is being committed in the present tense has been held to be a sufficient statement of time. Annot., *Search Warrant: Sufficiency*

of Showing as to Time of Occurrence of Facts Relied On. 100 A.L.R. 2d 525 (1965) A typical affidavit that has been held to sufficiently set forth the time of the occurrence of the facts relied upon is set out in full in the Virginia case of *Huff v. Commonwealth*, 213 Va. 710, 194 S.E.2d 690 (1973). This nine paragraph affidavit, without ever giving an exact date or time of any of the facts alleged uses the following terminology, "over a long period of time," "this continuing investigation," "the frequent recurrence," "that in recent weeks," "on certain nights," and "that on a recent date."

The Petitioner believes that the facts and circumstances of this case would give the Supreme Court of the United States an opportunity to rule that a definite statement as to the date of the occurrence of the events relied upon is necessary to show probable cause for the issuance of a search warrant. As the law now stands, there are no clear cut decisions as to what is considered a sufficient statement as to time. There should be a more definite decision in regard to a time element to both aid the issuing officers and to protect citizens from overzealous officials.

In this case, the affiant's mere belief that marijuana is currently being stored on the premises of the log cabin is a mere conclusion and is not a sufficient statement of fact in regard to time to support probable cause for the issuance of the search warrant in question. *Nathanson v. United States*, 290 U.S. 41. It is clear that the evidence obtained as a result of the illegal search warrant should have been suppressed and the failure to suppress this evidence has prejudiced the Petitioner in the trial of his case.

CONCLUSION

For the reasons stated, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

LOWRY J. MILLER
Miller, Miller, Patterson
& Reese
2701 North Pershing Drive
Arlington, Virginia 22201

Counsel for Petitioner

APPENDIX A

VIRGINIA

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

COMMONWEALTH OF VIRGINIA

V.

WILLIAM CHARLES JANSEN

Defendant

ORDER

This 5th day of November 1974 came the defendant, William Charles Jansen, in person and by counsel, pursuant to the motion heretofore filed to set aside the jury verdict and also appeared John W. Wine, Special Prosecutor; and was argued by counsel.

And it appearing to the Court for the reasons stated by the Court on this date, the reasons set forth in the Commonwealth's reply to the motion to set aside the verdict and the reasons stated previously during the trial of this cause that the verdict of the jury was right and proper and that the defendant's motion should be denied on all points; it is therefore

ADJUDGED and ORDERED that the defendant's motion to set aside the jury verdict shall be, and it hereby is, denied; and

It being further demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged

in delay of judgment thereof, and the defendant having stated that he was fully satisfied with the representation given him by his attorney, it is accordingly the judgment of this Court that the defendant be, and he hereby is, sentenced to confinement in the Penitentiary of this Commonwealth for a term of fifteen (15) years and that he be amerced a fine of $25,000.00 to the use of the Commonwealth and that the Commonwealth of Virginia recover against the defendant its cost by it about its prosecution in its behalf expended in the total of $789.50, which amount includes an allowance of $38.00 to the Court Reporter for the operation of the Court machine.

And it having been represented to the Court that the defendant was subject to a six year penitentiary sentence imposed in the Circuit Court of Arlington County, the Court doth order that six years of the sentence heretofore pronounced against the defendant this day shall run concurrently with the six year penitentiary sentence imposed in the Circuit Court of Arlington County.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably represented the defendant.

Upon motion of counsel for the defendant, the Court directs the Clerk of this Court to forward to defendant's counsel copies of a transcript of all proceedings had in this cause, the defendant's counsel having represented to the Court that he was desirous of prefecting an appeal on behalf of his client.

And the defendant is remanded to the custody of the jailor of this Court to be returned to the authorities of

the Arlington County Jail forthwith, wherein he is being held for the authorities of the penitentiary.

The Clerk of the Court is directed to forward a copy of this Order to the Jailor of this Court, to the Jailor of Arlington County, to the Superintendent of the Penitentiary, 500 Spring Street, Richmond, Virginia; and to the Special Prosecutors and the Attorney for the Defendant.

Enter this 3d day of Dec. 1974.

Raynard V. Snead
JUDGE

A copy,
Teste: H.L. Pearson, Clerk
By Deputy Clerk

John W. Wine
Special Prosecutor

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 27th *day of* August, 1975.

The petition of William Charles Jansen for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fauquier County on the 3rd day of December, 1974, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Record No. 750242

Teste:

Howard G. Turner, Clerk

By: /s/ Allen L. Lucy
Deputy Clerk

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 5th *day of* September, 1975.

William Charles Jansen, Plaintiff in error,

against Record No. 750242

Commonwealth of Virginia, Defendant in error.

Upon a Petition for Rehearing

On mature consideration of the petition of the plaintiff in error to set aside the judgment rendered herein on the 27th day of August, 1975, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste: [illegible]

Clerk

APPENDIX D

Affidavit for Search Warrant
(Rule 3A:27)

State of Virginia
County of Fauquier

Before me, the undersigned, this day came R.O. Jacobson, Investigator Virginia State Police
who, after being duly sworn, made oath that:

(1) He has reason to believe that on the premises known as (See attached affidavit sheets) in the county (city) of (See attached affidavit sheets) there is now being concealed certain property, namely (See attached affidavit sheets).

(2) He bases his belief that such property can be found on those premises on the following facts:

See attached affidavit sheets

*(3)(a) He has personal knowledge of the fact set forth in paragraph (2).

or

*(3)(b) He was advised of the facts set forth in paragraph (2) by an informer. This informer's credibility or the reliability of the information may be adjudged by the following facts:

See attached affidavit sheets

(4)(a) The offense in relation to which the search is to be made is:

See attached affidavit sheets

(4)(b) The grounds for search and seizure are established by the following facts:**

See attached affidavit sheets

*(5)(a) He has personal knowledge of the facts set forth in paragraph (4).

or

*(5)(b) He was advised of the facts set forth in paragraph (4) by an informer. This informer's credibility or the reliability may be adjudged by the following facts:

See attached affidavit sheets

/s/ R.O. Jacobson
(Signature of Affiant)

State Police Investigator
(Official Title, if any)

Subscribed and sworn to before me on February 26th 1974.

Time: 8:10 P.M.

/s/ Helen [illegible] Young, Deputy Clerk
(Signature and Title)

*If subparagraph (a) is applicable, strike out subparagraph (b). If subparagraph (b) is applicable, strike out subparagraph (a) and set forth the relevant facts in the space provided in subparagraph (b). The informer need not be identified.

**Give reasons why the property should be searched for and seized. If the property to be searched for is contraband, a description of the property will suffice. If the property to be searched for was an instrumentality of a crime or was stolen or embezzled, set forth facts showing probable cause to believe that the property was an instrumentality of a crime or was stolen or

embezzled. If the property to be searched for is property that was used or is being used in committing a crime, set forth facts showing probable cause to believe the property was used or is being used to commit a crime. If the property to be searched for is property constituting evidence of a crime or evidence that a particular person committed a crime, set forth facts showing probable cause to believe that seizure of the property will aid in a particular apprehension or conviction.

Affidavit for Search Warrant

(Rule 3A:27)

State of Virginia
County of Fauquier

Before me, the undersigned, this day came Investigator R.O. Jacobson Virginia State Police who, after being duly sworn, made oath that:

(1) He has reason to believe that on the premises known as a two story log cabin dwelling located approximately 300 feet off of State Route 731 in Fauquier County, Virginia. This dwelling is located 4 3/10 miles from the Marshall, Virginia Post Office. In order to reach this dwelling from the Marshall, Virginia Post Office you travel 2 5/10 miles west on State Route 55, turn right on State Route 677, take the 1st turn on State Route 723 and cross over State Route 55 to the intersection of State Route 731. Turn right on State Route 731 and proceed 3/10 of a mile to the driveway entrance on the right, in the County of Fauquier there is now being concealed certain property, namely marihuana.

(2) He bases his belief that such property can be found on those premises on the following facts:
In Arlington County, Virginia, the Virginia State Police secured a wire tap on a telephone listed to Zellen M. Dempsey (telephone Number 703 979-1432) of 613 S. Quincy Street, Arlington, Virginia. Affiant has been given information from Det. Paul W. Cope #298 Arlington County Police Dept. that one Thomas W. Walsh is a resident of the aforementioned address. Pursuant to an intercepted conversation between the Walsh subject and a subject known only as Eddie to the effect that the Walsh subject was to meet Eddie at a cabin located in Fauquier County, Virginia and that the Walsh subject would pick up a quantity of marihuana and put the aforementioned marihuana in his jeep, and deliver said marihuana to a subject by the name of Leroy, who would be parked in a church lot near the location of the cabin.

As a result of this conversation the jeep was followed and its was observed meeting a white over blue chevrolet with Pennsylvania license plates. These vehicles were followed to a point in Fauquier County, Virginia, at which time they separated and the Walsh jeep was followed to a cabin located near the intersection of State Route 55 and State Route 723 in Fauquier County, Virginia. The Walsh subject was observed leaving his vehicle and going into the cabin. After a short time the Walsh subject was again observed leaving the cabin and getting back into his jeep. Walsh then proceeded to a point on State Route 731 near a white church where he once again met the subject in the white over blue chevrolet. Both vehicles and their drivers drove west on a dirt road into a wooded tract where they remained for approximately fifteen minutes.

Both vehicles then emerged and proceeded east on State Route 731. The Walsh subject, in his jeep, returned to the aforementioned cabin. The subject in the white over blue chevrolet proceeded eastbound on State Route 55 where he was stopped approximately three miles east of Marshall, Virginia by Investigator R.O. Jacobson. Upon stopping this vehicle a quantity of suspect marihuana, in excess of 100 pounds was seized from the vehicle, thus confirming the original wire tap conversation.

/s/ R.O. Jacobson
(Signature of Affiant)
26 February 1974 time 8:10 P.M.

The driver of the vehicle was subsequently arrested and charged with possession of marihuana with the intent to distribute. Trooper L.C. Foster of the Virginia State Police performed a preliminary field test (Valtox) on the suspected marihuana and the results were positive for marihuana.
It is the affiants belief that marihuana is currently being stored on the premises of the aforementioned cabin.

(3)(a) He has personal knowledge of the facts set forth in paragraph (2)

(4)(a) The offense in relation to which the search is to be made is: Marihuana, as listed in Section 54-524.84:4 Schedule 1(d)(10) Code of Virginia, and possessed in violation of Section 54-524.101:1(a) Code of Virginia.

(4)(b) He has personal knowledge of the facts set forth in paragraph (4).

/s/ R.O. Jacobson
(Signature of Affiant)

State Police Investigator
(Official Title, if any)

Subscribed and sworn to before me on 26 February, 1974 Time 8:10 P.M.

/s/ Helen W. Young, Deputy Clerk
(Signature and Title)

General District Court, Fauquier Co.